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# Supreme Court of the United States

OCTOBER TERM, 1964.

No. 33

ARABIAN AMERICAN OIL COMPANY,

*Petitioner,*

*against*

HOWARD FARMER,

*Respondent;*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT.

## REPLY BRIEF OF PETITIONER.

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WHITE & CASE,

*On the Brief.*

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## REPLY BRIEF OF PETITIONER.

Certain statements contained in respondent's answering brief suggest some reply.

### I.

At pages 3, 4 and 5 of his answering brief, respondent takes issue with petitioner's use of the words "rich litigant" appearing at pages 7 and 8 of petitioner's main brief, where petitioner stated:

"In his opinion Judge Weinfeld did not find the witnesses' presence at trial unnecessary but placed particular emphasis on the 'great disparity in the financial resources of the parties' and limited Aramco's travel expenses for witnesses because Aramco was a 'rich litigant' (T 54, 55; 31 F. R. D. 193, 194)."

At pages 55 and 56 of its main brief, petitioner stated:

"It is apparent that Judge Weinfeld limited the travel expenses of Aramco's witnesses to 100 miles largely on the basis that Aramco was a 'rich litigant' in relation to Farmer (T 54, 55; 31 F. R. D. at 193, 194). This holding of Judge Weinfeld seems, in effect to have been approved by the Court of Appeals, for the Court of Appeals affirmed Judge Weinfeld's allowance of only sixteen dollars per witness for transporting Aramco's witnesses to New York for the second trial, while at the same time reinstating the actual expense of transporting Aramco's witnesses to the first trial as allowed by Judge Palmieri. Furthermore, the Court of Appeals stated that the presence of Aramco's witnesses at both the first and second trials was 'essential' (T 72; 324 F. 2d at 364), but indicated that in certain cases the actual expenses of transporting witnesses to the place of trial can be limited on the basis 'of the relative financial resources of the parties' (T 71; 324 F. 2d at 363)."

It is a fact that Judge Weinfeld quoted from an earlier opinion of the Court of Appeals (285 F. 2d at 722) as conceded by respondent at page 3 of his answering brief. The Court of Appeals on that appeal involving the dismissal of the action for the failure of respondent to file a bond for costs as ordered by the district court, stated:

"Defendant, with its rich resources may well wish to try the case expensively, but it does not seem just that it should force plaintiff without such resources to guarantee payment therefor in advance." (285 F. 2d at 722).

The Court of Appeals in its opinion (324 F. 2d 359; T 66, *et seq.*) from which both parties petitioned for review by this Court, now under consideration stated (T 71):

"In exercising that discretion [in the allowance of costs], the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in all good faith."

It is submitted that the use of the words "rich litigant" by petitioner in its petition, pages 7, 8, 55 and 56, was not inappropriate.

The fact is that the Court of Appeals stated that the comparative wealth of the parties was a factor to be taken into consideration in the exercise of discretion by a trial court in the awarding of costs.

At page 4 of his answering brief, respondent refers to the fact that Judge Palmieri, in reviewing the taxation of costs after the first trial allowed expenses (\$17.60) in obtaining a copy of the oral argument before Judge Weinfeld on a motion for summary judgment, although Judge Weinfeld had not requested or indicated that he was interested in obtaining a copy of counsel's argument. The fact is that Judge Palmieri, in allowing this item of cost, stated in his opinion, dated December 10, 1959 (T 29):

"Plaintiff objects to the charges for transcripts of the minutes of three pre-trial hearings. In view of the nature and extent of these conferences and the importance of the rulings which were entered, I am of the opinion that it was necessary to have a full record of the arguments, stipulations, and rep-

resentations made by counsel. Since I have concluded that the transcripts were essential to a proper understanding of matters covered at the conferences and that reliance on memory and notes would have placed a severe burden on the Court as well as counsel, I exercise my discretion to allow these costs as taxed by the Clerk."

The minutes, as indicated to Judge Palmieri, were used in an argument before the court as to what statements had been made by counsel for respondent in the argument before Judge Weinfeld. Judge Palmieri's allowance of this item was disallowed by Judge Weinfeld but was reinstated by the Court of Appeals.

At page 4 of his answering brief, respondent, in a long footnote numbered 4, refers to the taxing of the deposition before trial of Lester Miles Snyder from Saudi Arabia and suggests that the testimony of J. C. McDonald in New York should have been produced. Respondent makes no reference to the record as required by the Rules of this Court. Rule 40.1 and 2. By this reference, respondent suggests that the expenses of Mr. Snyder on his trip from Saudi Arabia to New York were an objectionable item of cost. The fact is that *Mr. Snyder's expenses* were not incurred until after the first trial and before the second trial and *were not taxed*.

Mr. Snyder's testimony was given pursuant to the order of Chief Judge Sylvester Ryan, dated June 17, 1960, at

which time respondent made a motion which was granted to amend his complaint to increase the amount of alleged damages to \$160,000. This order required, among other things, that petitioner

“by an executive officer shall submit to an examination by plaintiff with respect to the authority of Dr. Allen to make the contract claimed by plaintiff in his complaint;” (T 6).

Mr. Snyder was produced by defendant because he was the executive officer of respondent who had general supervision of the hiring of employees who were expected to work in Saudi Arabia, such as Dr. Farmer. Mr. McDonald and Dr. Allen in New York were under his supervision with respect to the hiring policies and the general terms and conditions of employment of such employees. Of course, Mr. Snyder was not familiar with what actually occurred between Dr. Farmer and Dr. Allen. That testimony was available in New York from Dr. Allen, who had been examined extensively by respondent.

Mr. Snyder's testimony was that he knew nothing about the hiring of Dr. Farmer or the circumstances under which he was hired. He did not testify, as stated by respondent at page 7 of his answering brief, that he (Mr. Snyder) knew nothing about the authority of Dr. Allen to hire medical personnel to work in Saudi Arabia, such as Dr. Farmer.

Of course, Mr. McDonald was in New York and could have been examined by respondent at any time. When Mr. Snyder was examined it was suggested by respondent that Mr. McDonald should have been produced, the court suggested that respondent might want to withdraw the examination of Mr. Snyder (pages 35, 94 of pretrial examination of Mr. Snyder) but the suggestion was ignored and respond-

ent conducted an extensive examination (94 pages) of Mr. Snyder. Mr. McDonald's attendance was not thereafter requested and while he could have been subpoenaed before or at the trial, respondent never availed himself of that opportunity.

## II.

At pages 5, 6, 7 and 8 of his answering brief, respondent states that petitioner argues on alleged incorrect assumptions that: (i) respondent's case was based on testimony concerning events occurring in Saudi Arabia which petitioner was required to rebut; and (ii) that the necessary effect of the jury verdict was a determination that respondent had testified falsely.

The only event which occurred in New York was the meeting between Dr. Allen and Dr. Farmer, at which time Dr. Farmer was hired to work in Saudi Arabia for petitioner as an ophthalmologist. Dr. Allen testified with respect to that hiring and contradicted Dr. Farmer's statement that the term of his employment was for the duration of defendant's operation of its oil wells in Saudi Arabia. All other material events occurred in Saudi Arabia and they had to do with the performance of Dr. Farmer's work in Saudi Arabia and the events occurring prior to his discharge by petitioner. Dr. Farmer had claimed that he had been discharged for having reported truthfully alleged findings that many American employees of petitioner in Saudi Arabia were contracting trachoma, a tropical disease which leads to blindness. He claimed that his superiors had sought to intimidate him into suppressing his findings. The charges of Dr. Farmer were characterized by Chief Judge Lumbard (T 73):

"It is difficult to imagine a more serious charge against an employer than that he suppressed evidence that employees ran the risk of contracting a serious disease. In such circumstances, the defendant could not possibly have been expected to adopt less than the most effective means of disproving the plaintiff's charges."

Petitioner claimed that Dr. Farmer had been discharged for just cause, specifically that he had performed a non-emergency operation in violation of an express rule of the hospital and of accepted standards of medical practice in that he had failed to secure the results of blood and urinalysis tests before performing the operation under general anesthesia.

Witnesses from Saudi Arabia were required to attend in New York to meet Dr. Farmer's serious charges against petitioner.

Respondent in his answering brief at page 5, footnote 5, states:

"Defendant twice formally amended its answer, first to plead the statute of frauds and next on the call of the trial calendar after all examinations and preliminary proceedings had been concluded and the case was called for trial, to plead just cause for plaintiff's discharge. Thereafter, after plaintiff's counsel had opened his case to the jury, defendant injected a third defense, that no one in defendant's employ had authority to hire for the term alleged by the plaintiff."

These statements are simply untrue.<sup>1</sup>

An amended answer (T 3, 4) to the original complaint was filed on April 21, 1958 (see docket of Clerk of United States District Court). In that amended answer, filed over a year before the commencement of the first trial on May 11, 1959, there are two defenses alleged, i.e., the statute of frauds and

"If and in the event that it is found that plaintiff was employed by defendant for a term, defendant alleges that it terminated plaintiff's employment for good cause."

These two defenses were asserted pursuant to leave granted by orders of the district court dated March 20, 1958 and April 15, 1958.

On June 17, 1960 (T 6 and 7), after the first trial, respondent made a motion which was granted, to amend his complaint to increase the amount sought to be recovered to \$160,000. It was pursuant to this order of Chief Judge Ryan that plaintiff was permitted to take the testimony of Mr. Lester Miles Snyder in September 1960, referred to hereinabove at page 5.

It also is stated by respondent in his answering brief that it was after plaintiff's counsel opened his case to the jury (he does not say whether this occurred at the first or second trial) that defendant injected a third defense that no one in defendant's employ had authority to hire for the term alleged by plaintiff. This simply is not true and

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<sup>1</sup> The original complaint sought to recover \$4,000. It was served in June 1956. At the commencement of the first trial before Judge Palmieri (May 11, 1959) respondent amended his complaint to recover \$59,683 (T 1 and 2).

respondent in his answering brief has not made reference to the record in making this statement.<sup>2</sup>

There was evidence produced by petitioner with respect to the fact that no one in its employ had authority to hire for the term alleged by respondent. Such evidence was adduced from witnesses from New York and from Saudi Arabia. These witnesses also testified that no one has such a term contract.

At page 6 of his answering brief, respondent states that he was discharged on the "narrowest of technicalities" in connection with which defendant called witnesses

"from far-off places, one, an expert, to testify with much solemnity about the serious consequences attendant upon failure to comply with such rule, and, another, the head of a hospital at which plaintiff had previously been employed, to testify plaintiff had acknowledged, while there, receiving a set of rules which included a rule similar to the one in question, and that plaintiff had been guilty of neurotic behavior at his former place of employment."

The fact is that the expert who was called to testify about the existence of the rule and its acceptance as a standard of medical practice in the medical profession and about the serious consequences that might follow the failure to comply with such rule and standard, was Dr. Joseph F. Artusio, Jr., Anesthesiologist in Chief at New York Hospital, Cornell Medical Center and Professor of Anesthesiology at the Cornell University Medical College, located at 525 E. 68 St., New York, N. Y. The other witness and expert, Dr. Richard L. Meiling, Associate Director of the

<sup>2</sup> See Rule 40.1(e) and .2 of Rules of the Supreme Court of the United States. The same objection is applicable to other portions of respondent's answering brief and to the statements contained in the first paragraph on page 6 of petitioner's brief in No. 32 (804). Such statements should be disregarded.

Ohio State University Health Center and University Hospital, where plaintiff had been a resident in ophthalmology for three years, came from Columbus, Ohio. Plaintiff at first had denied the existence of any such rule in the medical profession and it became important to establish definitely that such a rule existed and that plaintiff personally was aware of it.

### III.

At page 2 of his answering brief, respondent states:

"We shall therefore move for a dismissal of defendant's cross-appeal."

Respondent does ~~not~~ raise any questions with respect to question 1 presented by petitioner here (Aramco). Respondent concedes that questions 2, 5, 6 and 7 presented by petitioner here deal with the same issues presented by respondent as petitioner in No. 32. With respect to questions 3, 4 and 6, he concedes that they are encompassed within his question 2 in No. 32. He argues that petitioner's questions 3 and 4 are improperly before the Court in that question 3 is founded on an alleged incorrect statement of fact and in that petitioner's question 4 is based on an issue not present in this case and is based on a statement incorrectly attributed to the courts below.

Petitioner's question 3 in No. 33 is encompassed within respondent's question 1 in No. 32. Petitioner's question 4 in No. 33 is the specific question presented in petitioner's petition which was granted by this Court. Petitioner's question 6 clearly comes within question 2 presented by respondent in No. 32.

Petitioner's brief in No. 33 discusses and answers the questions presented by respondent as petitioner in No. 32 and the arguments contained therein should be treated as

answers thereto.<sup>3</sup> The motion improperly presented by respondent should not be entertained. See Rule 16 of the Rules of this Court.

### Conclusion.

As noted in petitioner's main brief at page 68, the judgment of the Court of Appeals for the Second Circuit should be remanded with instructions to allow all costs taxed by Judge Palmieri on the first trial, and to allow as costs the total round-trip expenses incurred by Aramco in transporting witnesses to the second trial.

Dated: November 4, 1964

Respectfully submitted,

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<sup>3</sup> See Stern-Gressman SUPREME COURT PRACTICE, 3rd ed. 1962, section 11-8, page 337.